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THE AGIENA[1]

Belgian Council of Prizes, 1919

In case No. 53, sailing vessel *Agiena,* the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the sailing vessel *Agiena,* formerly belonging to H. J. Hill of Rotterdam, be declared legal and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Whereas, M. Bauss, attorney, enrolled in the list of attorneys of Antwerp, has presented himself for the following second party: [List of English underwriters omitted.]

Having heard the Commissioner of the Government, Van Gindertaelen, as well as the said M. Bauss, in their respective pleas and motions;

Whereas, the English underwriters, listed under the letters A, B, C, D, E, present themselves as having insured the ship *Agiena* against risks of war and total loss, and as being subrogated in all the rights of the Dutch owner, M. H. J. Hill, in consideration of having indemnified him for the said total loss;

Whereas, their intervention in the case is admissible;

Whereas, it is otherwise in the case of the English underwriters listed under the letters F to P who availed themselves of the subrogation in the rights of the *Eerste Hollandsche Vensterglasfabriek* relating to the insured merchandise;

Whereas, in fact the Commissioner of the Government sues only for the validation of the capture of the ship, and whereas, the cargo which has not been made the object of any capture on the part of the Belgian State, and over which no rightful claim arises, cannot give occasion for a decision by the Council;

Whereas, the intervention of the said English underwriters is henceforth nonadmissible;

In law:

Whereas, public international law is the sum total of the rules that have emanated from natural reason, consecrated by customs and treaties, which fixes the mutual relations of states in the general and public interest;

Whereas, if the natural law of nations, which finds its source in reason and conscience, should inspire positive law as an ideal toward which it must strive, it has no immediate and practical value and it cannot be reverted to except in default of treaties or usages resulting from the common consent of states; whereas, the sources of the positive law of nations can be summed up under the following two general heads: principal and

[1] Translated from the *Moniteur Belge,* 1920, p. 405.

direct sources comprising treaties and usages, and accessory and indirect sources comprising the legislation and jurisprudence of states and the doctrine of authors (Georges Bry, *Précis élémentaire de droit international public,* pp. 4, 6);

Whereas, it is accordingly quite indifferent whether the question in dispute is or is not covered by Belgian law, from the moment when it has been established that its solution can be derived from other sources of an equal, or a superior degree, of international law;

Whereas, the circumstance that the Council should necessarily render judgment in accordance with the principles of this law and is not bound by national laws rather constitutes for the interested parties a guarantee of impartial justice;

Whereas, it was not a sort of defiance toward the national prize court, which it instituted, that prompted the Belgian legislature to make possible an appeal, either determined or eventual, against the decisions of the former, but the intention of conforming to a usage universally followed by maritime nations as well as to the provisions of the Hague Convention relative to the establishment of an International Prize Court;

Whereas, in the accomplishment of the mission devolving upon it, the Council could not have had any other concern than that of deciding in accordance with the rules of law and justice and of pronouncing its judgment with all the impartiality that may be expected of a Belgian tribunal, in validating prizes, if this measure becomes necessary, and, in the opposite case, in allotting to Belgium the legitimate advantage of a law which is justified by her victory and her sacrifices;

Whereas, prize law belongs to that class of law which very ancient usages have consecrated as much as an international law recognized by all peoples; whereas, this law has been maintained, save for certain restrictions, by numerous provisions, explicit or implicit, of the Hague Convention, although it had been the object, in the Conference, of spirited criticism, and although the delegates of the majority of the states had voted a proposition tending toward its abolition;

Whereas, this extraordinary result is due to the preponderating intervention of the delegates of certain great maritime Powers who emphasized —and not without reason—counter to the apparently justified principles of law and equity invoked on the other hand, that in naval warfare things do not present themselves as in land warfare; that the violent operations of war that are found there do not suffice in general to lead the adversary to conclude peace, and that it is, moreover, necessary for a belligerent to have the means of checking the economic life of his adversary by hindering or even suppressing his commerce with the outside world; that since the seizure of enemy merchantmen can bring about this disturbance in the economic life of the country to which they belong, it appears henceforth as a powerful means of coercion and ultimately as a measure directed by

a belligerent state more against another belligerent state than against individuals, and which can contribute effectively to bring about a quick peace, to save many human lives, which are more precious than material goods. (Speech of Louis Renault in the Second Hague Conference of 1907.);

Whereas, it was necessary to recall these important considerations in order to avoid combating in the present litigation indirectly and unjustly the legitimacy of a system of law which, notwithstanding a different ideal to which civilized nations, it seems, ought to tend, forms an integral part of positive international law, and which can only be suppressed by virtue of an express provision consecrating the absolute inviolability of private property not only on sea but also on land;

Whereas, although it has not been codified, prize law is nevertheless governed by certain essential and precise rules upon which, whatever may be said thereof, an agreement has been reached between nations of maritime power, and which in spite of inevitable divergences of application, can serve as a basis of appreciation even for a nation deprived up to the present time of imposing naval forces and for the prize tribunal which the fortune of arms has permitted it to establish;

1. Whereas, one of these most essential rules lies in the fact that the decision of a prize tribunal which validates a capture has the effect of depriving the owner of his right of property over the enemy or neutral vessel, and of transferring this right to the state of the captor; whereas, the vessel changes thus in a legal way its flag and its nationality;

2. Whereas, a second principle, also quite certain and universally admitted, provides that it devolves only upon the prize tribunal of the country from which the captor originates, to the exclusion of every foreign jurisdiction, to adjudge the permissibility of the capture, and consequently to pronounce judgment upon the vadidity thereof;

Whereas, without doubt, such decisions are not absolutely irrevocable, and, after all, the fate of a ship captured by a belligerent depends eventually upon the conditions of the treaty of peace, but whereas it is none the less true that as long as the war continues these decisions preserve their legal validity and their character relating to the ownership, subject only to be eliminated by virtue of the conditions of peace;

3. Whereas, according to another principle which dominates all maritime prize law, every merchantman of enemy character can be legally captured unless covered by one of the cases restrictively determined by the Hague Convention or the Declaration of London, and which do not exist in the present instance;

Whereas, from these three rules, well determined and incontestable, there follows the consequence that no "recapture" or "recovery," in the sense and with the effects that are generally attached to such an operation in international law, can take place unless before the recapture of the vessel

a confiscatory sentence has been rendered by the prize tribunal of the enemy, such a sentence having the effect of depriving the owner definitively of his right. "Capture," says Georges Bry (p. 492, ff.), "has in the first place only a provisional and precarious character which in definitive law is transformed only by the judgment of the courts entrusted with pronouncing upon its validity. When the prize has been taken away from the captor after the seizure and *before the confiscation pronounced by sentence,* a 'recapture' takes place; this is the re-establishment of the previous state; the owner, whose ship was captured, recovers his property; the seizure is purely and simply annulled" (see in the same sense Wheaton, *Elements of International Law,* II, pp. 20 ff.; Despagnet, p. 665 and 666; Travers Twiss, pp. 324 ff.; Carlos Testa, p. 43; Pasquale Fiore, p. 521; De Pistoye and Duverdy, II, pp. 105 ff.; Calvo, V, Sec. 3198. See also *Revue de Droit International,* Vol. VII, p. 612; Report of M. Alberic Rolin to the Fifth Commission, *Institut de Droit International,* 1875, reproducing the corresponding opinions of Bluntschli and de Bulmerincq, as well as the Italian author, Schiattarella [on the recapture of neutral vessels].

Whereas, the recapture of a ship from the enemy after its condemnation in a prize court constitutes, therefore, in reality a new prize, having for its object a vessel of enemy character and not being able to admit the obligation of restoring it to the former owner;

Whereas, the words "recapture" and "recovery" are synonymous, and in former privateering warfare, today abolished, the expression "to pursue the recovery of a ship" meant to follow the vessel which had seized the ship, with the intention of capturing the former together with its prize, or at least of obliging it to abandon this prize, in depriving it thereof. (de Pistoye and Duverdy, *loc. cit.*);

Whereas, such an operation implied naturally and according to the principles formerly admitted, that the vessel should be recaptured within a period relatively close to the time of its capture, and particularly within a period of twenty-four hours, fixed by the then prevailing custom, in such a way that the ship might be considered as finding itself firmly in the possession of the captor after such a delay, and as having changed ownership; whereas, later it was required, in order to justify the assumption that the owner had been deprived of his right, that the vessel should have been escorted to safety by the captor in a port *infra proesidia,* and as the English prize decisions say: "Brought into a place so secure that the owner can have no immediate prospect of recovering it"; whereas, in the case of the *Santa Cruz,* judged in 1798, and relative to some allied Portuguese vessels captured by the French and recaptured by the English, the learned jurisconsult Sir W. Scott did not hesitate, from the point of view of theoretic principles, to consider the *deductio infra proesidia* as the true rule which, in his opinion, should decide the deprivation of the owner, although other nations, he added, may be far from agreeing on this point and may

be content to follow the twenty-four hour rule, or some other more rigorous rule of that nature; but, whereas, however that may be, "right of recapture" has undergone evolutions in the different countries, and from remote times up to our day there has never been any doubt, from the point of view of the principles of international law, that at least a confiscatory sentence of a prize tribunal should have the effect of depriving the owner of his right and should hinder the obligation of restitution in case of recapture from the enemy;

Whereas, this is the formal rule proclaimed by the United States of America in the Act of Congress of 1800, maintained in force since that time, and which is applicable in equal measure to the national or allied vessels recaptured from the enemy as it is to neutral vessels. (See Wheaton, *loc. cit.*);

Whereas, with regard to England, Article 40 of the Naval Prize Act of 1864 limits itself to stipulating the right to restitution for the benefit of British subjects, and whereas if this provision, which moreover reproduces similar provisions of earlier acts of Parliament going back to the year 1649, has been interpreted and applied in this sense, namely, that the right to restitution was acquired regardless of whether the recapture was effected before or after the condemnation of the vessel, it is in accordance with this that England intended to favor her national subjects with regard to the ever increasing development of commercial property; but, whereas, it could not result from this special law thus proclaimed by England for herself, and of a restrictive character, that subjects of allied or neutral Powers should be admitted to enjoy the benefits thereof to the whole extent to which it has been interpreted and applied;

Whereas, it is true, as Sir W. Scott said in the case of the *Santa Cruz,* "that the maritime law of England, having adopted a broader rule of restitution or of safety with regard to recaptured property of her subjects, grants the benefits of this rule to her allies as far as the point where they seem to act toward English property according to a less liberal principle, and in such a case she adopts their rule and treats them according to the measure of their justice." But, whereas, all this is only true in so far as no condemnation of the allied vessel by any enemy prize court has taken place, since the acts of Parliament have put into force again, as far as English subjects only are concerned, the *jus postliminii* of the orginal owner. (See Wheaton, *loc. cit.,* in this sense.);

Whereas, with regard to neutrals, the English courts have generally decreed the restitution in case of "recapture" properly so-called, even without indemnity, unless the vessel has been in danger of condemnation by the enemy, in which case indemnity was due; but, whereas, they have always considered that the recaptured vessel only had neutral character in the absence of a condemnation by the prize tribunal of the enemy, which legally brought about the deprivation of the owner and the change of

nationality of the ship. (Argument of Sir W. Scott in the case of the *Charlotte Caroline,* Prize Cases II, 149.);

Whereas, the legislation of other countries, such as Holland, Denmark, Spain, Sweden, and Portugal, has likewise undergone evolutions, but in every case within the limits indicated above, that is to say, that the owner was necessarily deprived of ownership by virtue of a sentence of condemnation;

Whereas, especially, when the Ordinance of March 28, 1810, returned the Danish property or the property of the allies of Denmark, without regard to the time that it had remained in the possession of the captor, upon payment of one-third of the value as salvage, the law of February 3, 1864, provided, on the contrary, that the Danish vessels recaptured from the enemy are considered as valid prizes;

Whereas, the Italian Code of Maritime Law, promulgated in 1865, established several distinctions which differentiated national or allied merchantmen recaptured by a privateer and such vessels recaptured by a man-of-war, according to which the latter must be restored to their owner without remuneration, even if they have already been taken to an enemy port; whereas, the same is true of a foreign vessel freighted on account of the state, but no mention is made of a foreign vessel not freighted on account of the state, from all of which it must be concluded that a neutral vessel as well as a national or allied vessel whose ownership has passed over into the hands of the belligerent by virtue of a judgment should not be restored in case of recapture;

Whereas, in France the Decree of Prairial of the Year XI is applicable to French or allied vessels, to the exclusion of neutral vessels; whereas, with regard to the former there is no proof that it has had the effect of derogating from the universally admitted principle which provides that a confiscatory sentence pronounced by the competent prize tribunal effects a change of character of the vessel; whereas, the repeal of the twenty-four-hour rule proves moreover that it has not been possible to consider an effective recapture after a rather long lapse of time such as is generally supposed by the formalities and the prize procedure according to the regulations in force; whereas, the neutral vessels that are recovered should be restored according to the principles of international law, but whereas, on the other hand, the reason which compelled their restitution disappeared in case of recapture after condemnation by the prize tribunal of the enemy;

Whereas, in the case of the privateer *Le Hasard* v. *The Statira,* M. Portalis, Commissioner of the Government, expressed himself as follows under the guidance of the Decree of Prairial: "If we are dealing, on the contrary, with a foreign vessel claiming to be neutral, the arrest of this vessel by the enemy does not render it suddenly enemy property, since its confiscation cannot be pronounced by the magistrate. *Until the confiscatory judgment the ship sailing as a neutral loses neither its character nor*

its rights. After the arrest it can recover its liberty. *In such a case* the recovery of this vessel could not, therefore, bring about the transfer of ownership into French hands by which this recovery was operated. The question of neutrality always remains entire; it should be decided before everything. Such is the language of all the publicists, such is the custom of all the civilized nations. This being admitted, the ship *Statira* has not become confiscable *by the fact alone* that she was recovered from the enemy" (de Pistoye and Duverdy, II, p. 123);

Whereas, it was apparently due to these so judicious and juridical observations that in the course of the recent war of 1914-1918 the instruction of the Minister of Marine of January 30, 1916, was rendered in so far as it dealt with "recovery"; whereas in speaking of French or allied vessels captured by the enemy "you will strive to effect their recovery," and furthermore of the neutral vessels recovered "you will release them purely and simply," these instructions show that we are not dealing with a recapture after a capture of firm possession on the part of the enemy and a sentence of condemnation by one of its prize tribunals, but of a ship which remained legally and apparently neutral according to international law and the distinguishing signs which should cause it to be recognized as such;

Whereas, quite similarly to the Hague Convention, the Declaration of London recognized in several of its provisions and particularly in its Articles 41, 48 and 66, the legality of national prize jurisdiction, and whereas, it would be a fruitless question if we were to inquire into the *raison d'être* of these provisions if the effects of a sentence of condemnation were not to be imposed upon all with the same authority, belligerents as well as neutrals, the latter having to submit thereto by virtue of the necessity of war; whereas, it cannot be seen moreover how it would logically be possible to admit the effects of such a sentence in the relations between the captor and the captured, and to refuse to apply them in the relations between the captured and a recaptor;

Whereas, Article 57 of the Declaration of London provides that the neutral or enemy character of the vessel is determined by the flag which it is entitled to fly; whereas, after a confiscatory sentence pronounced by the prize tribunal of a belligerent, the flag which an enemy or neutral vessel is entitled to fly is that of the belligerent who has made the capture, and this legal change of flag renders the vessel confiscable on the part of the opposing belligerent, as an enemy vessel; whereas, it follows from the preceding considerations that according to the spirit of the international treaties and according to modern usage adopted by all nations, the decision which validates a prize fixes in a definite manner the juridical fact of the deprivation of the owner, the cause of the right of the recaptor, and that while admitting that according to the countries and the cases given, it may have been possible to make varying applications of this principle, it de-

volves upon the council to adhere purely and simply to the American Law and to derive therefrom the sole logical consequence which it admits, namely, the absence of the obligation of restoration in case of recapture of a neutral or allied vessel;

Whereas, the English underwriters maintain, unjustly, that it is not possible to attach any value to the decision of the German prize jurisdiction for the reason that the capture in question was only an act of piracy violating the rights of neutrals and the Declaration of London to which Germany has adhered;

Whereas, if it were necessary, in the present case, to investigate whether the German decision was or was not rendered in conformity with the rules of international law and of the Declaration of London, it would be in order to observe that in fact the latter Declaration has not been perfectly respected by any of the belligerents; whereas, the Allied Powers have been forced by the attitude and the unjustifiable methods of war of Germany to make modifications thereof in conformity with their most essential interests, particularly with regard to the specification of articles of absolute or conditional contraband; whereas, Germany has, on her part, made modifications of the Declaration touching the same point, and, whereas, thus the belligerents have released themselves mutually and in a tacit manner from their reciprocal obligations in this respect, in such a way that the violation of these obligations cannot be charged against them; whereas, the neutrals have moreover been warned by the notifications of decrees of the various belligerents of the fact that they would no longer be able to count upon the integral execution of the Declaration of London with regard to the limitation of articles of contraband, and whereas, they have, nevertheless, and at their own risk, undertaken maritime expeditions involving the prohibited goods; whereas, international law admits, moreover, that a belligerent, with a view to safeguarding his interests, which he considers essential, exercises a certain pressure upon neutrals in reducing their commercial relations with the outside world, and the loss which results for them therefrom is amply compensated for by the enormous advantages which after all their commerce secures for them in time of war (Clunet, *Journal de Droit International,* 1919, 1st and 2d books);

Whereas, in reality, the prohibition resulting from Article 28 of the Declaration, interdicting the treating of window glass as contraband, with which the present litigation deals, did not touch the substance of international law as other stipulations contained in the Declaration, and which are only the reproduction of certain rules of this law already recognized in their broad outlines by the customs of the nations; whereas, an infraction of such a prohibition, purely conventional and more or less arbitrary, does not appear to have assumed in the mind of the belligerents any more than in the mind of the neutrals, who are forced to accept it, the character of a violation of a principle or of an essential rule of international law;

But, whereas, under any hypothesis, the jurisdiction of the court of the nation which has made the capture is conclusive on the question of ownership of the captured property; whereas, its decision terminates every controversy relative to the validity of the capture between the claimant and him who has made the capture and those who claim after them that this sentence terminates every juridical question on the matter; whereas, if the violation of international law has been committed by a prize tribunal, it follows therefrom solely that the state which has instituted the tribunal and which is supposed to have given the latter its instructions, in conformity with Article 66 of the Declaration of London, is responsible by reason of such a violation, but not that it should be permitted to open again for discussion, either with regard to the captor or a recaptor, the question of ownership definitively decided by the competent tribunal or the validity of its decision (Wheaton and Georges Bry, *loc. cit.*);

Whereas, the Belgian State, in availing itself of the German prize decision, could not incur the reproach of wishing to sanction a violation of international law committed by the enemy; whereas, it limits itself to claiming the use of a right based upon the success of the military operations of its army and to desiring to derive the legal consequences from a situation which it has not created and with the justification of which it should not interfere;

Whereas, it is true, the final fate of the enemy prizes could depend upon the conditions of the intervening treaty of peace; whereas, it must be remarked that Article 440 of the Treaty of Versailles, in so far as it permits the revision by the Allied Governments of the decisions rendered by the German prize tribunals, is directed against Germany, in so far as the latter has preserved the possession of certain ships unjustly captured and declared by its tribunals to be good prizes and which could, as a result of a revision of the sentence, be detached from the lot of those ships that are to be returned to the Allied and Associated Powers in execution of the stipulations of the Treaty of Peace, for the purpose of being restored to the prejudiced neutral or allied subjects; whereas, this provision does not aim to do an injustice to one of the Allied Powers in depriving it of the benefits of a recapture based on a German prize decision.

In fact:

Whereas, on July 12, 1917, the sailing vessel *Agiena,* flying the Dutch flag and bound from Maassluis to Havre with a cargo composed especially of cases of window glass, was seized as a prize in the North Sea by German hydroplanes and taken by a torpedo boat to Zeebrugge, and from there to the interior port of Bruges, where it was chartered by the Netherlands firm Gist en Spiritus Fabriek for voyages between Bruges and Brussels;

Whereas, it follows from the documents in the dossier that the vessel was declared a good prize by a decision of the Hamburg Court rendered under date of November 16, 1917;

Whereas, it follows therefrom, as well as from the considerations made above, that the *Agiena* became a German vessel and that it was subject to capture when, on October 19, 1918, the Belgian troops captured it in the port of Bruges;

Whereas, while admitting, in default of greater precision on the part of the dossier, that the vessel was condemned on account of carrying contraband of war, notwithstanding Article 28 of the Declaration of London which forbade the treatment of glassware as such, the decision of the German prize jurisdiction is nevertheless possessed of a legal force imposing itself upon all and of such a nature as to form the basis of the right of capture of the Belgian State;

Whereas, it is true, the English underwriters in the case maintained, with documents in support thereof, that on July 23rd and 26th, 1917, that is to say, between the date of capture and that of the decision of the prize tribunal, they insured the hull of the ship for the benefit of the Dutch owner and that as a result of the payment of the indemnity by them for the total prize they have become subrogated to his rights with the consequence that the ship had become their property and was considered to be flying the English flag at the date of its recapture from the enemy;

But, whereas, this circumstance could not have the effect of modifying the juridical situation resulting from the German prize decison;

Whereas, in principle, the said underwriters could not have, with regard to the recaptor, more rights than the previous Dutch owner had, deprived of every remedy against the former; whereas, it is indifferent that the date of their title antedates that of the judgment validating the prize; whereas, the ship was captured and judged as a neutral vessel having infringed upon the rules of neutrality; and, whereas, it was recaptured as an enemy and neutral vessel before its original capture, the latter alone having to be considered in the present case;

Whereas, to admit a contrary solution would result in permitting the evasion of the consequences of the previously neutral character of the vessel in case it would be in order to treat differently neutral vessels and allied ships recaptured from the enemy;

But, whereas, as it has been shown, no difference is to be made between the two cases and restitution of the ship is not in order no matter what point of view is taken;

Whereas, it follows from these considerations that the recapture of the ship *Agiena* by the Belgian troops is permissible and valid with respect to the English underwriters in the case; that it would have been declared thus also with regard to the firm Nederlandsche Gist en Spiritus Fabriek, which, it is alleged, purchased the ship at the German prize office under date of October 5, 1918, that is to say, at the time when, given the military situation, there was reason to fear that the vessel would come into the hands of the Allies, and therefore, with the manifest object on the part of

the German authorities to evade the consequences of the enemy character of the vessel, and hence under such conditions that the transfer to a neutral flag must be considered void according to the incontestable principles of international law, confirmed by Article 56 of the Declaration of London;

FOR THESE REASONS:

The Council having heard the Commissioner of the Government, Van Gindertaelen, in his pertinent motions, rejecting all contrary claims as unfounded, declares inadmissible the intervention of the English underwriters listed under the letters F to P, and acknowledging to the English underwriters listed under letters A to E the fact that they estimate the litigation for each of them at more than 20,000 francs, declares legal and valid the capture of the sailing vessel *Agiena,* and decrees that this vessel shall belong in its totality to the Belgian State. Expenses as in law.

THE BRUSSELS[1]

Belgian Council of Prizes

Antwerp, October 23, 1919

In case No. 46, *S.S. Brussels,* the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the steamer *Brussels,* of about 1380 tons, formerly belonging to the Great Eastern Railway Company, whose offices are at Harwich, be declared effective and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Having heard the Commissioner of the Government Van Gindertaelen in his reasons and motions;

Whereas, the steamer *Brussels,* flying the English flag and commanded by the late Captain Fryatt, was captured on the high seas by the German naval forces and taken to Zeebrugge; whereas, it was declared a legal prize by the decision of the Prize Court of Hamburg on November 15, 1916, confirmed by the Superior Prize Court at Berlin on July 29, 1917;

Whereas, it follows therefrom that the ship had become German property and that, according to the principles of the law of nations, it was subject to seizure when, in the month of October, 1918, the victorious Belgian troops captured it in the port of Zeebrugge, where it was sunk by the enemy;

Whereas, no objection could be made that, forming the subject of the recapture of an allied ship, this ship should, according to international

[1] Translated from the *Moniteur Belge,* Nov. 6, 1919, p. 5894.